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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JOSE SALVADOR ESPINOZA et al., Defendants and Appellants.	B288107 (Los Angeles County Super. Ct. No. PA083777)

APPEAL from judgments of the Superior Court of Los Angeles County. Cynthia L. Ulfig, Judge. Affirmed and remanded with directions.

Brad Kaiserman, under appointment by the Court of Appeal, for Defendant and Appellant Jose Salvador Espinoza.

Randy S. Kravis, under appointment by the Court of Appeal, for Defendant and Appellant Mauricio Rivas.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Zee Rodriguez and Noah P. Hill, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendants and appellants Jose Salvador Espinoza and Mauricio Rivas appeal from convictions by jury of first degree murder and attempted murder. Gang and firearm use allegations were also found true. Defendants challenge their convictions on numerous grounds.

We affirm both convictions, but remand for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

Defendants were charged by information with one count of murder (Pen. Code, § 187, subd. (a) [count 1]), and one count of attempted murder (§ 187, subd. (a), § 664 [count 2]).[1] As to count 2, it was alleged the attempted murder was committed deliberately, willfully and with premeditation. It was further alleged as to both counts that the offenses were committed for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(4)). It was also alleged that in the commission of both offenses, a principal personally and intentionally used and discharged a firearm causing great bodily injury or death to the victims (§ 12022.53, subds. (b)-(e)(1)). Finally, it was alleged both defendants had suffered a prior conviction for a serious or violent felony within the meaning of the "Three Strikes" law (§ 667, subds. (b)-(j), § 1170.12), and that Espinoza had suffered five prison priors, and Rivas had suffered three prison priors (§ 667.5, subd. (b)).

The case proceeded to a jury trial in October 2017. The evidence and testimony admitted at trial established the following facts.

1. The Events of January 22, 2015

In the San Fernando Valley near North Hills, there are several active street gangs, including Columbus Street and Langdon, each of

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[1] A third defendant (Wilfredo Romero) was also charged, but the jury was unable to reach a decision as to Romero's guilt and the court declared a mistrial. We summarize facts related to him only as relevant for context.

which is associated with different streets in the neighborhood. The Columbus Street and Langdon gangs are rivals and consist primarily of Hispanic members. The Spanish word, *lengua*, is a term used to refer to a Langdon gang member.

On the night of January 22, 2015, Maria G. was working in her food truck with her employee, Sandra G. The truck was parked on Rayen Street near the intersection with Langdon Avenue in North Hills, just west of Sepulveda Avenue. Sometime around 9:45 p.m., three young men approached Maria's truck and started talking in Spanish to customers standing at the order window. They demanded the customers lift up their shirts and show whether they had tattoos on their chests, asking "are you *Lenguas*?"

Maria heard one of the men say the word Columbus but she did not hear exactly what was said. The one "giving the orders" was wearing glasses. Sandra saw that he had a gun tucked into his waistband. None of the customers had tattoos and the three Hispanic males walked off in the direction of another food truck parked a short distance away in a church parking lot between Langdon Avenue and Sepulveda Boulevard. After they walked away, Maria heard one of her customers say the one wearing glasses had a gun. Within a few minutes, Sandra and Maria heard multiple gunshots.

Nicanor F. owned the food truck in the parking lot. Two employees, Alejandro M. and Jose M., were working with him that night. Alejandro went outside to take some trash to a nearby dumpster. As he walked back to the truck, Alejandro noticed three males walking up to two customers. He heard the men direct the customers to lift up their shirts. Once back inside the truck, Alejandro told Nicanor and Jose there was someone outside with a gun. Nicanor looked out the window and saw three males. Two of the men were hitting one customer, and the third man was pointing a gun at the other customer. Jose recognized the customer as a regular at the food truck named Payaso. Payaso was holding up his hands,

backing away from the man with the gun and saying "wait, wait." Nicanor, Alejandro and Jose then heard multiple gunshots and ducked down to the floor of the truck. Alejandro said he heard at least 14 or 15 gunshots.

When Maria heard the gunshots, she became concerned about Nicanor, so she left her truck and started walking over to check on him and his workers. She saw people running from the area, including several males that appeared similar to the Hispanic men who had approached her customers just minutes before. When she got up to Nicanor's food truck, Maria saw the teenage son of a woman she knew. He was injured so Maria asked him if he wanted her to call his mom and he said no. Maria knocked on the door of the food truck and spoke to Nicanor, Alejandro and Jose.

Jose went outside and saw Payaso laying on the ground. He had been shot in the face and there was a lot of blood. The other younger customer had been shot in the leg. There was a bullet hole in the food truck. Jose called 911.

Carlos M. was the customer who had been shot in the leg. He was 14 years old and a member of the Langdon gang. He had gone to the food truck with a fellow Langdon gang member, Bryan Henriquez, also known as Payaso. Carlos and Bryan were eating tacos when several people approached them. Carlos could not recall how many people approached them. The next thing he recalled was waking up laying on the ground. About 10 feet away, he saw Bryan laying on the ground, bleeding from his face. After the shooting, Carlos exchanged messages with another friend through his Facebook account saying he had been shot by Columbus Street gang members (the "enemigas" or enemies "got me"), that prior to the shooting he saw "three of these foo[ls] . . . dawging me" and that "them bitch ass foo[ls] took the homie away and they just got me once."

Elvira A. was a former girlfriend of defendant Espinoza. They had known each other since they were kids. Elvira did not consider

defendant Rivas a friend but she knew him because he was a friend of Espinoza. She identified a photograph showing several individuals, including Rivas, in her car about a week before the shooting. In the photograph, Rivas was holding his hands in the shape of the letter "C" (a Columbus Street gang sign).

On the night of the food truck shooting, Elvira drove to a market at the intersection of Rayen Street and Sepulveda Boulevard. Espinoza had called her earlier, said he needed a ride home and asked her to meet him in the parking lot. Sometime after 9:30 p.m., Elvira arrived at the agreed-upon market in her silver Sequoia SUV and parked. Her young children were in the car with her.

After waiting in her car for a few minutes, Elvira heard multiple gunshots. She was scared for her children, so she backed out of the parking space. As she started to pull away, she saw Espinoza and Rivas running toward her car. Espinoza jumped into the backseat of her car where her kids were seated. Rivas jumped into the front passenger seat. She saw a third male running with them (she did not recognize him), but he did not get into the car. He kept running down the street. Elvira's children began to cry and she begged Espinoza and Rivas to get out of her car, but they both yelled at her to "Go, go."

Rivas was wearing a bandana that covered most of his face except for his eyes, but she knew it was him. When asked several times on cross-examination about identifying Rivas, she unequivocally stated she knew it was him when he got into her car, irrespective of the bandana.

Elvira pulled out of the parking lot and headed down Rayen Street. Espinoza kept saying something about another person, he sounded worried about where that person was, but she could not recall exactly what he said. After driving about a block, Elvira pulled her car over at the corner of Columbus Street. She again asked Espinoza and Rivas to get out. Rivas told Elvira not to say anything. Espinoza and Rivas then got out of the car and headed down Columbus Street.

Video footage from several security cameras was played for the jury and Elvira identified her car in the parking lot of the market, as well as separate footage showing her pulling over to the curb and both defendants getting out of her car.

That night, Mario S. was on Columbus Street talking to his soccer coach when he heard multiple gunshots. A few minutes later, he saw several young men running down the street. Two of them were holding handguns, one of which appeared to be a semiautomatic. He heard them yelling, "We got those motherfuckers," "We are -- Columbus Street," and "This is our territory." Mario did not see their faces.

An audio recording of a 911 call was played for the jury in which the caller said he had heard gunshots and then saw two young Hispanic males jump into a gray van being driven by a woman with children in the car. The caller said one of the men was trying to hide a gun in the waistband of his pants.

Several hours after dropping off Espinoza and Rivas, Elvira spoke with Espinoza. She asked him about the shooting and why he had been there. Espinoza admitted he had been at the scene where it happened but did not say he had shot anyone. He said "that's what [we] do," "straight not giving [a] fuck." Espinoza also told Elvira not to say anything and that if she did, she would be "green light[ed]" which she understood to mean she would be shot. He told her that if she was questioned by the police, she should say that her car had been stolen by a "Blythe Streeter" (referencing another rival gang).

Sometime after the shooting, Elvira saw Rivas in the neighborhood and he just looked at her and laughed.

2. The Investigation

Detective Ryan Verna of the Los Angeles Police Department was the lead investigating detective. At the scene of the shooting, 14 shell casings from a semiautomatic weapon were recovered. The parties stipulated that all 14 shell casings were fired from the same weapon.

Detective Verna also recovered the video footage from numerous security cameras in the vicinity of the shooting, including footage showing Elvira's gray SUV in the market parking lot and pulling over and dropping off both defendants.

An autopsy was performed on Bryan Henriquez. The parties stipulated the cause of his death was multiple gunshot wounds.

Both Maria and Sandra spoke to the investigating detectives. Sandra described the men who had approached the food truck as young Hispanic males, probably in their late 20's or early 30's. One wore glasses and was very light-skinned. Sandra looked at a photographic lineup of six photographs (six-pack) and identified the individual in photograph number five (Espinoza), writing next to it "belong[ed] to a gang." Sandra said she was very frightened to testify because she works in the same area. Had she known she would have to come to court, she would have run away and not spoken to any police officer.

Maria was also asked to look at a six-pack. In court, she denied having identified anyone and said she was afraid to be testifying. Detective Juan Santa, a 24-year veteran officer, testified he was the one who showed the six-pack to Maria sometime shortly after the shooting. She was fearful and did not want to participate. She said one of the men had been very fair-skinned, so much so she had been surprised to hear him speaking in Spanish. When shown the six-pack, she pointed out photograph number five (Espinoza) and made a circular motion with her finger. Maria said he appeared more fair-skinned in person. She would not initial the six-pack but did sign her name to the admonishment form.

In June 2015, Elvira was arrested and interviewed by Detective Verna. She implicated Espinoza and Rivas in the shooting.

It was determined that neither defendant lived near the crime scene. But cell phone records recovered by the detectives showed that Espinoza's phone was in the vicinity of the crime scene at the time of

the shooting, as was Elvira's phone. Records for Rivas's phone showed no activity after mid-morning on January 22, 2015 with all incoming phone calls going unanswered or straight to voicemail.

In February 2017, while Espinoza remained in custody awaiting trial, another Hispanic inmate was found in possession of a kite Espinoza had written. A kite is a handwritten note exchanged between inmates that is usually folded up to be small and concealable. The kite indicated Espinoza was trying to locate Elvira so he could get her "to take back her statement" but he had not been successful in "locating that bitch, I think she's probably staying in Santa Clarita with her brother." The kite was directed to "Minor" which was Rivas's gang moniker.

3. Elvira's Plea Agreement and Trial Testimony

Elvira testified that after her arrest in June 2015, she was charged as an accomplice to the murder and attempted murder, and her four minor children were taken into protective custody. When interviewed by Detective Verna, she explained what happened and how Espinoza had asked her to come pick him up. In addition to the facts above, Elvira testified she knew Espinoza was a Columbus Street gang member with the moniker Rens. She admitted she knew something bad had happened that night but did not voluntarily report anything to the police because she was scared. After Espinoza was arrested, Elvira corresponded with him in jail and sent him a picture of herself. Elvira denied she was in a gang, but was familiar with gang members, knowing members of both Columbus Street and Langdon. She grew up on Langdon Avenue in gang territory.

In July 2016, Elvira entered into a "Leniency Agreement" with the District Attorney's office. She pled guilty to being an accessory after the fact and admitted the gang allegation. She agreed to testify truthfully in the trial of Espinoza and Rivas. Approximately four months later, she was released from custody, having spent a total of

18 months in jail (a review of the record appears to indicate she only served 16 months).

4. The Gang Evidence

Sergeant Larry Hernandez of the LAPD testified as the prosecution's gang expert. He spoke about Hispanic gang culture generally, as well as the Columbus Street gang and its various cliques. Sergeant Hernandez explained that Columbus is a large active gang in the North Hills area of the San Fernando Valley. He identified the hand signals and common tattoos of Columbus Street gang members, including the tattoos of both defendants, and that they often wear clothing from professional sports teams that use the capital letter "C" in their logo, such as the Los Angeles Clippers. Sergeant Hernandez identified the primary activities of the Columbus gang, as well as the predicate offenses. He stated his opinion, based on his experience, that Espinoza, Rivas and Romero were all active members of the Columbus Street gang in January 2015. Sergeant Hernandez said that Espinoza often wore glasses, but not always. In response to a hypothetical question based on the facts of the shooting, Sergeant Hernandez opined that such crimes would benefit the reputation and street credibility of the gang.

Sergeant Hernandez testified that Bryan Henriquez was a Langdon gang member with the moniker Payaso. Columbus Street and Langdon were rival Hispanic gangs, and in January 2015, there were heightened hostilities between them because of the murder of Sergio Galvan.

5. The Defense Evidence

Rivas did not testify and did not call any witnesses.

Espinoza called one witness, Dr. Mitchell Eisen, a forensic psychologist, whose specialty was the study of human memory and the factors affecting eyewitness testimony. He stated his opinions about the various factors that impact eyewitness testimony and an individual's ability to accurately recall an event, including whether

the individual was trying to recall a stressful event and other suggestibility factors. Dr. Eisen opined that people can be inaccurate even when they are attempting to recall an event in good faith—it is an "error-prone" process.

Dr. Eisen said he regularly testified as an expert witness and was on a panel of approved experts for the Los Angeles Superior Court. When he first began qualifying as an expert witness around 1995, he worked almost exclusively on behalf of prosecutors, but over the years he had been more regularly called by defense counsel. He said he believed it had been about four years since he was last called on behalf of the prosecution. Dr. Eisen testified that it would be improper for him to tell any jury that an identification was suspect, and that he testifies only about the science of eyewitness identification and the factors that impact how humans perceive and recall memories in order to assist the jury in evaluating identification evidence.

Dr. Eisen said he was paid about $1,500 for his work on this case, including speaking with the defense lawyers and testifying. Dr. Eisen said he earns about $80,000 annually as a professor, and estimated he earned on average about $100,000 annually from testifying as an expert witness.

6. The Verdict and Sentencing

The jury found Espinoza and Rivas guilty as charged.

The sentencing hearing was held on February 7, 2018. Espinoza was a miss-out. The court stated for the record that Espinoza had previously been admonished on several occasions that absenting himself from the proceedings would result in the court proceeding in his absence. The court, over defense counsel's objection, proceeded with the sentencing hearing. Espinoza's counsel was present, as was Rivas and his attorney.

The court heard and denied the motion for new trial by Rivas, in which Espinoza joined. The court also heard and denied Espinoza's

motion to strike pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

The court conducted the bench trial on defendants' prior convictions. Both Espinoza and Rivas had previously waived their right to a jury trial on the priors. The court found true the allegations that defendants had each suffered a prior qualifying strike within the meaning of the Three Strikes law. The court also found true three prison priors as to Espinoza, and one prison prior as to Rivas.

In pronouncing sentence, the court stated that, based on the facts of the case and the defendants' respective criminal histories, "the factors in aggravation clearly outweigh any factors in mitigation of which there are none."

The court sentenced both defendants as follows: On count 1 (murder), a term of 25 years to life, doubled due to the strike, plus a consecutive term of 25 years for the firearm enhancement (Pen. Code, § 12022.53, subd. (d)); a consecutive term of seven years to life on count 2 (attempted murder), doubled due to the strike, plus a consecutive term of 25 years for the firearm enhancement. The court imposed and stayed gang enhancements on both counts.

The court imposed a determinate term of five years as to Espinoza for the prior felony conviction pursuant to Penal Code section 667, subdivision (a)(1). The reporter's transcript of the hearing does not include the imposition of a five-year term as to Rivas, but Rivas's abstract of judgment does include a five-year term pursuant to section 667, subdivision (a)(1).

The record does not disclose any dismissal of the prison priors, nor the imposition of any sentence for the prison priors as to either defendant.

As to both defendants, the court imposed an $80 court operations assessment (Pen. Code, § 1465.8), a $60 criminal conviction assessment (Gov. Code, § 70373), a $300 restitution fine (Pen. Code, § 1202.4), and $487 in attorney fees reimbursement (Pen. Code,

§ 987.8). The court also imposed and stayed a $300 parole revocation fine. The court ordered restitution in the following amounts: $4,014.48, $2,014.48, and $3,095.52. The court did not award any custody credits to either defendant.

These appeals followed.

DISCUSSION

1. The Denial of Espinoza's *Faretta* Motion

Espinoza contends the trial court's denial of his motion to represent himself pursuant to *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*) was reversible per se. We disagree.

After two requests to substitute new counsel were denied a little over a month before trial was scheduled to start, Espinoza filed a written motion to represent himself pursuant to *Faretta*. The motion was heard and denied on September 18, 2017, with trial set to begin on October 2, 2017. In denying the motion, the trial court relied on Espinoza's gang history, the number of witnesses who had expressed fear about testifying, and a three-page report documenting numerous instances of serious misconduct by Espinoza while in custody, including refusal to obey orders, possession of a handcuff key, possession of shanks and assaultive behavior.

The Sixth Amendment right to self-representation is not absolute. (*People v. Butler* (2009) 47 Cal.4th 814, 825 (*Butler*).) A defendant proceeding in propria persona risks forfeiting the right if he or she engages in misconduct that offends the dignity of the courtroom or disrupts the trial. "[O]pportunities to abuse the right of self-representation and engage in obstructionist conduct are *not restricted to the courtroom*." (*People v. Carson* (2005) 35 Cal.4th 1, 9, italics added (*Carson*) [rejecting prior rule that only in-court conduct could result in the forfeiture of *Faretta* rights].) "Ultimately, the effect, not the location, of the misconduct and its impact on the core integrity of the trial will determine whether termination is warranted." (*Ibid.*)

Carson explained that "[w]henever 'deliberate dilatory or obstructive behavior' threatens to subvert 'the core concept of a trial' [citation] or to compromise the court's ability to conduct a fair trial [citation], the defendant's *Faretta* rights are subject to forfeiture. Each case must be evaluated in its own context, on its own facts." (*Carson*, *supra*, 35 Cal.4th at p. 10.) In assessing the totality of circumstances, the trial court should ordinarily consider "the availability and suitability of alternative sanctions," the degree to which the misconduct is closely connected to the fair and orderly conduct of trial, and "whether the defendant has been warned that particular misconduct will result in termination of in propria persona status." (*Ibid*.)

Moreover, the defendant's acts of misconduct "need not result in a disruption of the trial—for example, by successfully dissuading a witness from testifying. The *likely, not the actual, effect of the misconduct should be the primary consideration*." (*Carson*, *supra*, 35 Cal.4th at p. 10, italics added.)

In reviewing a trial court's order denying a defendant's *Faretta* rights, we "accord due deference to the trial court's assessment of the defendant's motives and sincerity as well as the nature and context of his misconduct and its impact on the integrity of the trial in determining whether termination of *Faretta* rights [was] necessary to maintain the fairness of the proceedings." (*Carson*, *supra*, 35 Cal.4th at p. 12.)

Here, the trial court was aware of repeated in-custody acts by Espinoza, who had a long history of violent gang involvement, that demonstrated he was a serious security risk. And, based on pretrial proceedings, the court was aware that Espinoza had threatened Elvira and was attempting to locate her to influence her testimony. One of the most serious forms of misconduct "is witness intimidation, which by its very nature compromises the factfinding process and constitutes a quintessential 'subversion of the core concept of a trial.' " (*Carson*,

supra, 35 Cal.4th at p. 9.) The court was also aware that several witnesses had expressed fear of testifying because of Espinoza's gang membership.

Given these facts, the trial court was well within its discretion in concluding the likely effect of Espinoza's behavior, if he was allowed the latitude to represent himself, was a significant disruption of the trial process. Indeed, the trial court's concerns were eventually borne out. The court had to order Espinoza separated from the other two defendants because of his refusal to obey orders to not speak during the proceedings. Espinoza had to be placed in restraints during trial, and on at least one occasion, Espinoza delayed the start of trial by refusing to leave his cell, claiming he wanted to sleep in and laughing at the court when later admonished for doing so. Multiple witnesses exhibited a reluctance to testify and expressed continued fear of being in the courtroom and having to testify against defendants. Elvira confirmed during her testimony that Espinoza had threatened her.

Espinoza's reliance on *Butler* is unavailing. *Butler* does not stand for the proposition that a defendant's out-of-court misconduct is an insufficient basis for denying a *Faretta* motion. Indeed, *Butler* expressly stated that out-of-court misconduct is a valid factor to be considered, citing *Carson*. (*Butler*, *supra*, 47 Cal.4th at p. 826, citing *Carson, supra,* 35 Cal.4th at p. 10.) *Butler* found it unnecessary however to address the out-of-court conduct by the defendant there because the trial court had not relied on that conduct in revoking his *Faretta* rights. When the defendant's misconduct in jail was raised in opposition to his initial request to proceed in propria persona, the trial court expressly said it was not concerned about that conduct because " 'we can handle [the defendant] in the courtroom.' " (*Butler,* at p. 826.) The trial court allowed the defendant to continue to represent himself but later revoked the defendant's *Faretta* rights because of the limitations placed on his ability to prepare for trial while in custody. (*Butler,* at p. 827.)

In revoking the defendant's rights, the trial court did not rely in any way on his pretrial misconduct in jail, but rather asserted that self-representation " 'just doesn't make sense' " given the restrictions placed on in propria persona litigants in custody which ultimately cause problems during trial. (*Butler*, *supra*, 47 Cal.4th at p. 827.) Because the trial court relied on an improper basis to revoke the defendant's *Faretta* rights, the *Butler* court concluded reversal and a remand for a new trial were warranted. (*Butler,* at pp. 827-828.)

Nothing in *Butler* undermines our conclusion the trial court here acted within its discretion in denying Espinoza's request to represent himself at trial.

2. Elvira's Testimony

a. The leniency agreement

Defendants contend the trial court prejudicially erred in admitting Elvira's testimony. Defendants argue the leniency agreement between Elvira and the prosecution was unconstitutionally coercive and compelled her to testify in a particular manner. We are not persuaded.

" ' "[A] defendant is denied a fair trial if the prosecution's case depends substantially upon accomplice testimony and the accomplice witness is placed, either by the prosecution or the court, under a strong compulsion to testify in a particular fashion." [Citation.] Thus, when the accomplice is granted immunity subject to the condition that his [or her] testimony substantially conform to an earlier statement given to police [citation], or that his [or her] testimony result in the defendant's conviction [citation], the accomplice's testimony is "tainted beyond redemption" [citation] and its admission denies the defendant a fair trial. On the other hand, although there is a certain degree of compulsion inherent in any plea agreement or grant of immunity, *it is clear that an agreement requiring only that the witness testify fully and truthfully is valid*.' " (*People v. Gurule* (2002) 28 Cal.4th 557, 615 (*Gurule*), italics added.)

The admission of Elvira's testimony did not offend this standard. Defendants take issue with the agreement for including language stating, in relevant part, that "[i]t is believed" that Elvira was the former girlfriend of Espinoza, knew Rivas, and on January 22, 2015 drove both defendants from the corner of Sepulveda and Rayen to Columbus and Rayen. Defendants argue this compelled Elvira to testify consistently with her prior statements to law enforcement in which she acknowledged picking up both defendants in a parking lot and dropping them off near Columbus Street.

Defendants overstate the significance of this language. The core of the plea agreement is in paragraph 5. It provided that Elvira would plead guilty to a violation of Penal Code section 32 and admit the gang allegation. It then stated: "Subject to compliance with the conditions stated in paragraph 6 below and in exchange for [Elvira's] truthful testimony and cooperation, the People agree at sentencing to strike" the gang allegation and agree to a three-year prison term. Paragraph 6 was clearly worded and required only that Elvira "testify truthfully," and answer all questions posed by both the People and the defense "in a complete and truthful manner." Paragraph 8a provided that the issue of whether Elvira testified truthfully would be decided by a neutral magistrate or judge.

Thus, the leniency agreement only compelled Elvira to testify truthfully and completely about the events of January 22, 2015, in accord with applicable law. (*Gurule*, *supra*, 28 Cal.4th at p. 615.) None of the language in the agreement infringes on defendants' constitutional rights to due process and a fair trial.

b. Evidence Code section 356

Espinoza also contends the court erred in limiting the scope of Elvira's testimony about their post-shooting conversation. He contends the selected portions of the conversation admitted during the prosecution's case-in-chief were misleading, and that Evidence Code section 356 required the admission of additional portions for context.

We review questions regarding a court's ruling admitting or excluding evidence under section 356 under the deferential abuse of discretion standard. (See, e.g., *People v. Pride* (1992) 3 Cal.4th 195, 235.) We find no such abuse here.

Evidence Code section 356 provides in relevant part that "[w]here part of [a] conversation . . . is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; . . . and when a . . . conversation . . . is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence."

During pretrial proceedings, the court ruled that Elvira could testify about certain portions of her post-shooting conversation with Espinoza in which he admitted he had been at the scene of the shooting but had not said he was involved. She was also allowed to testify that he told her "that's what [we] do," and also that he told her not to say anything, and if questioned by the police to say her car had been stolen by a rival gang member. Espinoza initially sought to admit additional portions of the conversation in which he apparently implicated Rivas in the shooting and also said they had simply been walking down the sidewalk when the shooting occurred. The transcript of Elvira's statement to police describing the full conversation between her and Espinoza is not a part of the appellate record.

Rivas objected to the admission of any portion of the conversation implicating him, and ultimately the court limited the scope of questioning about the conversation as stated above. When Elvira testified at trial, Espinoza raised the issue again during a sidebar discussion. Espinoza said he would not seek to elicit any testimony attributing the shooting to Rivas, but only wanted to introduce the portion of the conversation where he said they had only been walking down the street when the shooting occurred. The court

denied Espinoza's request, finding no basis to deviate from its in limine ruling on the issue.

"By its terms [Evidence Code] section 356 allows further inquiry into otherwise inadmissible matter only, (1) where it relates to the same subject, and (2) it is necessary to make the already introduced conversation understood." (*People v. Gambos* (1970) 5 Cal.App.3d 187, 192, italics omitted.) The additional matter "must shed light on that which is already admitted [citation]; and it must be necessary to make the earlier conversation understood or to explain it." (*Id.* at p. 193.)

Elvira testified that Espinoza never said anything about being the shooter, only that he had been at the scene when the shooting occurred. The additional statement that he had only been walking down the sidewalk related to the same subject matter but was not necessary to make the admitted portion of the conversation understandable.

In any event, any error was harmless by any standard. There was testimony from two of the food truck workers (Sandra and Maria) placing Espinoza at the scene, with a gun, confronting customers and asking if they were members of the Langdon gang. The testimony of the workers from the other food truck where the shooting took place corroborated Sandra and Maria's testimony. Elvira testified Espinoza and Rivas, wearing a bandana around his face, ran up to her SUV, jumped in and demanded she drive them from the scene. Both Espinoza and Rivas threatened her about talking to the police. The security camera footage and 911 call corroborated Elvira's testimony, as did the testimony of Mario who saw at least two individuals with guns running down Columbus Street (near where Elvira had dropped them off), yelling "We got those motherfuckers," and "We are -- Columbus Street," "This is our territory."

Given this evidence, as well as the gang evidence offered by Sergeant Hernandez, any additional testimony from Elvira that Espinoza told her he had only been walking down the street at the

time of the shooting would not reasonably have altered the outcome. (*People v. Arias* (1996) 13 Cal.4th 92, 156-158 [where prosecution presented portion of conversation containing the defendant's admission in the murder, no harm in precluding admission of additional portion of conversation where the defendant purportedly prayed for the victim's survival and had only stabbed him "reflexively"].)

3. The Evidence Supporting Attempted Murder

Defendants challenge the evidence supporting their convictions for attempted murder. We review the record according to the familiar standard. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11 (*Rodriguez*) [appellate court reviews the "whole record in the light most favorable to the judgment to determine whether it discloses . . . evidence that is reasonable, credible, and of solid value"]; see also *People v. Kraft* (2000) 23 Cal.4th 978, 1053 ["appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence"].)

Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing. (*People v. Superior Court (Decker)* (2007) 41 Cal.4th 1, 7; see also Pen. Code, § 21a.) The requisite intent for attempted murder is express malice.

We conclude there is ample evidence in the record supporting attempted murder as to both defendants on a theory of express malice. The evidence established that Espinoza and Rivas, along with Romero, were intentionally seeking out members of the rival Langdon gang on the night of January 22. They confronted several individuals at Maria's food truck, asked if they were Langdon gang members and demanded they lift their shirts to reveal whether they had any gang tattoos. Espinoza was seen with a handgun in the waistband of his pants. After satisfying themselves that none of those customers were gang members, they walked to the next food truck and demanded the

same of the two customers there, Bryan Henriquez and Carlos, both of whom were Langdon gang members. Bryan and Carlos were within 10 feet of each other, standing still. Bryan had his hands up, telling defendants to stop. Defendants then fired 14 shots, resulting in Bryan being fatally shot multiple times, including in the face, and Carlos being shot in the leg. Defendants immediately fled the scene and were heard yelling about their exploits on behalf of the Columbus gang. Both defendants also threatened Elvira, who drove them from the scene, not to say anything about what happened that night and that if she was questioned by law enforcement, directed her to say her car had been stolen by a rival gang member.

The foregoing evidence established that both victims were next to one another at the time defendants fired 14 shots at close range in their direction. Such evidence supports a reasonable inference that defendants harbored express malice towards both victims. The act of "purposefully firing a lethal weapon at another human being at close range, without legal excuse, generally gives rise to an inference that the shooter acted with express malice." (*People v. Smith* (2005) 37 Cal.4th 733, 742 (*Smith*); see also *People v. Chinchilla* (1997) 52 Cal.App.4th 683, 691 ["Where a defendant fires at two officers, one of whom is crouched in front of the other, the defendant endangers the lives of both officers and a reasonable jury could infer from this that the defendant intended to kill both"].)

During the pendency of this appeal, the Supreme Court issued its decision in *People v. Canizales* (2019) 7 Cal.5th 591 (*Canizales*), in which it acknowledges *Smith*, stating the defendant there "was properly convicted of two counts of attempted murder for having fired at close range a single bullet at a former girlfriend seated in the front seat of her car and the infant who was in a car seat immediately behind her, both of whom were in his direct line of fire." (*Canizales,* at p. 603.) Later in its analysis, *Canizales* reiterates the sufficiency of the evidence in *Smith* to establish an intent to kill: "evidence that the

defendant discharged a lethal firearm at two victims who were seated directly in his line of fire supported an inference that he acted with intent to kill both victims." (*Canizales,* at p. 608.)

The facts here are stronger than in *Smith* and are more than ample to support an inference of defendants' intent to kill both Bryan and Carlos on an express malice theory. As in *Smith*, reliance on a kill zone theory was unnecessary to establish the requisite intent for attempted murder on count 2.[2]

4. The Jury Instructions

We review claims of instructional error de novo. (*People v. Cole* (2004) 33 Cal.4th 1158, 1210.)

a. The Kill Zone Theory (CALCRIM No. 600)

Defendants contend the court erred in instructing the jury on kill zone theory. In their original briefs, defendants did not contend the language of the instruction was misleading, only that the instruction should not have been given at all because there was no evidence to support a kill zone theory. After the issuance of *Canizales*, we granted Espinoza's request to file a supplemental brief. Espinoza argued CALCRIM No. 600 failed to adequately explain the contours of kill zone theory as announced in *Canizales* and was substantially likely to have confused the jury.

In *Canizales*, the Supreme Court expressed its concern about the "the misapplication of the kill zone theory" by some appellate courts. (*Canizales*, *supra*, 7 Cal.5th at p. 606.) The court clarified,

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[2] *Smith* was an express malice case. The jury was not instructed on kill zone theory. (*Smith*, *supra*, 37 Cal.4th at p. 746.) The theory, raised by the defendant for the first time on appeal, was discussed and rejected by the *Smith* majority as irrelevant. The dissent in *Smith* discussed the kill zone theory, and *Canizales* discussed with approval the dissent's kill zone analysis. *Canizales* did not, however, impliedly disapprove the *Smith* majority's discussion of express malice attempted murder.

consistent with its original pronouncement on kill zone theory in *People v. Bland* (2002) 28 Cal.4th 313, that an instruction on kill zone theory is proper only where "the circumstances of the defendant's attack on a primary target, including the type and extent of force the defendant used, are such that the only reasonable inference is that the defendant intended to create a zone of fatal harm—that is, an area in which the defendant intended to kill everyone present to ensure the primary target's death [and] the alleged attempted murder victim who was not the primary target was located within that zone of harm." (*Canizales,* at p. 597.)

In so doing, *Canizales* suggested that CALCRIM No. 600 "should be revised to better describe the contours and limits of the kill zone theory as we have laid them out here." (*Canizales, supra,* 7 Cal.5th at p. 609.) The court otherwise declined to reach the defendant's claim the instruction was constitutionally infirm. (*Id*. at p. 618.)

We conclude that any error in instructing with CALCRIM No. 600 was harmless by any standard.

The evidence was overwhelming that defendants were seeking out rival Langdon gang members to kill that evening and confronted both Carlos and Bryan standing near one another by the food truck prior to unleashing 14 shots at them at close range. The prosecutor never argued kill zone theory to the jury or mentioned it in the presence of the jury, and neither did the defense lawyers. The prosecution theory was defendants intended to kill both victims, and the defense addressed that theory. This simply was not a kill zone case.

The jury was instructed with a modified version of CALCRIM No. 600 which included one paragraph on kill zone theory.[3] But the

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[3] As relevant here, the instruction read: "A person may intend to kill a specific victim or victims and at the same time intend to kill

court also instructed the jury with CALCRIM No. 200 which included the following language: "[s]ome of these instructions may not apply, depending on your findings about the facts of the case. After you have decided what the facts are, follow the instructions that do apply to the facts as you find them."

Given this record, it is clear beyond a reasonable doubt that a reasonable jury would have returned the same verdict absent the instruction on kill zone theory. (*People v. Merritt* (2017) 2 Cal.5th 819, 826-831 [discussing standard set forth in *Chapman v. California* (1967) 386 U.S. 18].)

The court said in *Canizales* that it was presently considering in *People v. Aledamat* (rev. granted July 5, 2018, S248105) whether a more stringent test is appropriate in circumstances where the court instructs on a legally inadequate theory. (*Canizales*, *supra,* 7 Cal.5th at p. 615.) The more stringent standard would require reversal "unless there is a basis in the record to find that the jury actually relied on the valid theory." (*Ibid*.) As we have already explained, the only reasonable conclusion from the record here is that the jury found defendants guilty of attempted murder on the only theory argued, namely express malice.

b. Circumstantial evidence (CALCRIM No. 224)

Defendants contend the trial court erred in failing to instruct sua sponte with CALCRIM No. 224. We disagree.

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everyone in a particular zone of harm or 'kill zone.' In order to convict the defendant of the attempted murder of Carlos [M.], the People must prove that the defendant not only intended to kill Bryan Henriquez but also either intended to kill Carlos [M.], or intended to kill everyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill Carlos [M.] or intended to kill Bryan Henriquez by killing everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of Carlos [M.]."

While the prosecution did rely in part on circumstantial evidence, the evidence, and reasonable inferences therefrom, was not equally consistent with a reasonable conclusion of innocence. Accordingly, no sua sponte duty to instruct with CALCRIM No. 224 arose. (*People v. Heishman* (1988) 45 Cal.3d 147, 167 [no duty to instruct with CALJIC No. 2.01, the predecessor instruction to CALCRIM No. 224, "where the evidence relied on is either direct or, if circumstantial, is not equally consistent with a reasonable conclusion of innocence"].)

Further, the court did instruct with CALCRIM No. 223 defining direct and circumstantial evidence, and also with CALCRIM No. 225 which told the jury, as relevant here, that before it could rely on circumstantial evidence to conclude the defendants had the requisite intent and mental state, it "must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant[s] had the required intent and mental state. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions supports a finding that . . . the defendant[s] did not [have the requisite mental state and intent], you must conclude that the required intent and mental state was not proved by the circumstantial evidence." The jury was properly instructed on the relevant principles pertaining to circumstantial evidence.

5. Prosecutorial Misconduct

Defendants raise two claims of alleged prosecutorial misconduct, neither of which has merit.

" 'The applicable federal and state standards regarding prosecutorial misconduct are well established. " 'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." ' " [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct

under state law only if it involves " ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' " ' " (*People v. Hill* (1998) 17 Cal.4th 800, 819; accord, *People v. Fuiava* (2012) 53 Cal.4th 622, 679.)

First, defendants contend they suffered prejudice when the prosecutor showed an unredacted copy of the prison kite to the jury during closing argument. The kite written by Espinoza referenced his desire to locate Elvira to get her to take back her statement to police. The kite was directed to Minor (Rivas's gang moniker), but the word "Minor" had been redacted from the version admitted as an exhibit. When the prosecutor put up a slide of the kite during closing argument, he inadvertently displayed the unredacted version. It is undisputed that when an objection was raised, the prosecutor immediately took the slide down. According to defendants, the slide had been visible to the jury for about 20 seconds. In denying Rivas's request for a mistrial, the court stated the word "Minor" was very small and almost illegible. Moreover, the prosecutor never made any reference to Minor or Rivas in his argument but mentioned the kite only to argue it reflected Espinoza's guilt because of his desire to influence Elvira's testimony.

The trial court was well within its discretion in denying the oral motion for mistrial. There was nothing deceptive or reprehensible in the prosecutor's error, nor did the brief display of the unredacted version of the kite result in a fundamentally unfair trial.

We also reject defendants' second claim of alleged misconduct. During closing argument, the prosecutor showed a slide to the jury depicting the defense expert, Dr. Eisen, surrounded by stacks of cash. In connection with the slide, the prosecutor said that Dr. Eisen made a "boat load of money" testifying for defendants. Counsel for Rivas objected but did not specifically object to the use of the slide.

It is well established that a prosecutor may comment on the fees earned by an expert to impugn the credibility of that expert. (See,

e.g., *People v. Monterroso* (2004) 34 Cal.4th 743, 783 [no misconduct for prosecutor to comment upon and underscore the "substantial fee" earned by the defense expert, as well as the history of testifying only for the defense]; see also Evid. Code, § 722, subd. (b) ["The compensation and expenses paid or to be paid to an expert witness by the party calling him is a proper subject of inquiry by any adverse party as relevant to the credibility of the witness and the weight of his testimony."].) Defendants have not shown the prosecutor's brief use of one slide that mocked the amount of the expert's fees somehow transformed the otherwise fair comment on the expert's credibility into misconduct.

6. Cumulative Error

Espinoza argues the combined effect of the trial errors and misconduct by the prosecutor deprived him of due process and a fair trial. "In examining a claim of cumulative error, the critical question is whether defendant received due process and a fair trial. [Citation.] *A predicate to a claim of cumulative error is a finding of error*. There can be no cumulative error if the challenged rulings were not erroneous." (*People v. Sedillo* (2015) 235 Cal.App.4th 1037, 1068, italics added.) As explained above, Espinoza has not shown multiple trial errors or prosecutorial misconduct supporting a conclusion of any cumulative prejudicial effect.

7. The Sentencing Issues

a. Espinoza's absence from the sentencing hearing

Espinoza contends the court prejudicially erred in proceeding with the imposition of sentence in his absence. We independently review the trial court's decision in this regard. (*People v. Gutierrez* (2003) 29 Cal.4th 1196, 1202 (*Gutierrez*).)

A criminal defendant has a constitutional right to be present at all critical trial stages, including sentencing. (*People v. Espinoza* (2016) 1 Cal.5th 61, 72.) "But the right is not an absolute one. [Citation.] It may be expressly or impliedly waived." (*Ibid.*; accord,

Gutierrez, *supra*, 29 Cal.4th at p. 1202 [right to be present may be lost by consent or misconduct].)

In determining whether a defendant has voluntarily absented himself from the proceedings and therefore impliedly waived his right to be present, the trial court "must look at the 'totality of the facts.' " (*Gutierrez*, *supra*, 29 Cal.4th at p. 1205.) "A trial judge may rely on reliable information, such as statements from jail or court personnel, to determine whether a defendant has waived the right to presence." (*Ibid*.)

Several days into trial, Espinoza refused to come to court because he purportedly wanted to sleep in. The courtroom bailiff drove to the jail and picked up Espinoza in a patrol car, delaying the proceedings. Outside the presence of the jury, the court admonished defendants, both of whom had refused to come to court on different days. "The next time somebody refuses to come, we are going to proceed to trial without you being present, you will be deemed to have waived your presence, and we will just proceed without you because this is not going to be happening again." The record reflects that defendants laughed at the court's admonishment.

Several days later, counsel for Espinoza stated on the record that he had also advised his client that the court could proceed in his absence if he "pull[ed] a stunt" again like refusing to come to court. In concluding the day's proceedings, the court stated, "The defendants are ordered out on the morning bus. If they do not make the morning bus we will proceed without them because we are going to be in session tomorrow morning and I expect every one of them to be on the bus tomorrow. Any questions, Mr. Espinoza?"

Espinoza said "no."

On February 7, 2018, the continued hearing date for sentencing, Espinoza was once again a miss-out. The court stated, "My understanding is Mr. Espinoza is a miss-out, is that correct?" The courtroom bailiff said, "Yes, that is correct."

The court proceeded with the hearing, explaining "all defendants had previously been advised by this court if they absented themselves from the proceedings, the court would go forward with any motions that may be pending or any issues that were outstanding; they had been advised of that prior to their trial date. [¶] . . . [¶] So at this point in time, we will go forward."

Espinoza's counsel stated an objection for the record and the court proceeded to hear argument on the pending motions, and then proceeded to sentencing. At all times during the sentencing hearing, Espinoza's counsel was present and participated in the proceedings on his behalf.

The totality of circumstances demonstrate Espinoza voluntarily absented himself from the sentencing hearing and the court did not err in proceeding in his absence.

b. The fines and assessments

As to each defendant, the court imposed an $80 court operations assessment (Pen. Code, § 1465.8), a $60 criminal conviction assessment (Gov. Code, § 70373), a $300 restitution fine (Pen. Code, § 1202.4), and $487 in attorney fees reimbursement (Pen. Code, § 987.8). Relying primarily on *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), defendants argue it was a violation of their rights to due process and equal protection for the trial court to impose the assessments and fines without a showing by the People of their ability to pay.

Defendants concede they did not object on these, or any, grounds in the trial court. The contention has therefore been forfeited. (*People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153-1155 (*Frandsen*) [finding forfeiture where no objection raised in trial court to imposition of court operation assessment, criminal conviction assessment and restitution fine]; see also *People v. Avila* (2009) 46 Cal.4th 680, 729 [finding forfeiture where the defendant failed to

object to imposition of restitution fine under Pen. Code, former § 1202.4 based on inability to pay].)

We reject defendants' contention their forfeiture should be excused for the same reasons articulated in *Frandsen*.

In any event, even if we excused defendants' forfeiture, we would reject their claims. Nothing in the record supports the contention that the imposition of the $300 restitution fine (the statutory *minimum* amount for a felony), the $80 court operations assessment, the $60 criminal conviction assessment and the $487 reimbursement for attorney fees was fundamentally unfair to defendants or violated their constitutional rights to due process or the equal protection of the law. The facts here bear no similarity to the unique factual circumstances presented in *Dueñas*.

Defendants were given notice these assessments would be imposed in the probation report prepared prior to sentencing. After a sentencing hearing at which both defendants were represented by counsel, the court imposed the now-challenged assessments and restitution fine pursuant to clear statutory authority. In the absence of a timely objection by defendants, the trial court could presume the assessments and fine would be paid out of defendants' future prison wages. (See, e.g., *People v. Douglas* (1995) 39 Cal.App.4th 1385, 1397; *People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1837; *People v. Frye* (1994) 21 Cal.App.4th 1483, 1487.) Defendants have not articulated any basis for finding prejudice or a constitutional violation.

c. The firearm enhancements

Citing the recently published *People v. Morrison* (2019) 34 Cal.App.5th 217 (*Morrison*), defendants argue remand for resentencing is warranted to allow the trial court the opportunity to consider striking the 25-year firearm enhancement under Penal Code section 12022.53, subdivision (d), and imposing one of the lesser enhancements. The contention is without merit.

On January 1, 2018, Senate Bill No. 620 (2017-2018 Reg. Sess.) took effect, amending Penal Code section 12022.53, subdivision (h). The amendment granted discretion to trial courts to strike or dismiss an enhancement imposed under section 12022.53 in the interests of justice. (Stats. 2017, ch. 682, § 2.)

The sentencing hearing was held on February 7, 2018, *after* the effective date of Senate Bill No. 620. Therefore, at the time of sentencing, the trial court had the discretion to strike, in the interests of justice, the 25-year enhancement and impose one of the lesser enhancements (10 or 20 years) instead. The court did not do so. Further, the record establishes that neither defendant requested the court to exercise its newly granted discretion. Accordingly, defendants did not preserve this contention for appeal.

Moreover, *Morrison* is of no assistance to defendants. *Morrison* resolved the question of whether remand would be appropriate to allow a trial court to consider exercising its discretion to impose a lesser firearm enhancement in lieu of the greater enhancement, when the lesser enhancements had not been pled and proven. (*Morrison*, *supra*, 34 Cal.App.5th at p. 222.) *Morrison* said it did not apply to situations where, as here, the jury had returned true findings on the lesser enhancements under subdivisions (b) and (c) of Penal Code section 12022.53. In such circumstances, "the striking of an enhancement under section 12022.53, subdivision (d) would leave intact the remaining findings, and an enhancement under the greatest of those provisions would be mandatory unless those findings were also stricken in the interests of justice." (*Ibid.*)

d. The gang enhancement

Defendants contend, and respondent concedes, the gang enhancements imposed and stayed as to each defendant must be stricken.

The jury found true the firearm allegations as to each defendant on both counts pursuant to Penal Code section 12022.53, subdivisions

(b) through (e)(1). More specifically, the jury concluded, in accordance with subdivision (e), that *a principal* discharged a firearm causing great bodily injury or death in the commission of both counts, but the jury did not make findings of personal firearm use as to either defendant. The jury also concluded the offenses were committed to benefit a street gang within the meaning of section 186.22.

Penal Code section 12022.53, subdivision (e) provides in relevant part that: "(1) The enhancements provided in this section shall apply to any person who is a principal in the commission of an offense if both of the following are pled and proved: [¶] (A) The person violated subdivision (b) of Section 186.22. [¶] (B) Any principal in the offense committed any act specified in subdivision (b), (c), or (d). [¶] (2) An enhancement for participation in a criminal street gang . . . *shall not be imposed* on a person in addition to an enhancement imposed pursuant to this subdivision, *unless the person personally used or personally discharged a firearm in the commission of the offense*." (Italics added.)

The statutory language expressly instructs that a gang enhancement shall not be imposed in addition to a firearm enhancement unless the defendant personally used or discharged a firearm. The imposition of the gang enhancements was not statutorily authorized.

On remand, the superior court shall strike the gang enhancements as to both defendants.

e. Penal Code section 667

Defendants contend, and respondents concede, that remand is warranted to allow the trial court the opportunity to exercise its newly granted discretion under Senate Bill No. 1393 (2017-2018 Reg. Sess.). As relevant here, Senate Bill No. 1393 amended provisions of Penal Code section 667 and section 1385, granting discretion to trial courts to strike a prior serious felony conviction in connection with imposition of the five-year enhancement set forth in section 667,

subdivision (a)(1). (Stats. 2018, ch. 1013, § 1, § 2.) The amendatory provisions became effective January 1, 2019, during the pendency of these appeals.

At the time defendants were sentenced in February 2018, imposition of a consecutive five-year term pursuant to Penal Code section 667, subdivision (a)(1) was mandatory. In *In re Estrada* (1965) 63 Cal.2d 740, 744-745, the California Supreme Court held that, absent evidence of contrary legislative intent, it is an "inevitable inference" that the Legislature meant for new statutes that reduce the punishment for certain prohibited acts to apply retroactively to every case not yet final on appeal.

We agree that defendants are entitled to the benefit of the amendatory provision and that remand is therefore warranted. The record shows the imposition of a five-year determinate term as to Espinoza. As to Rivas, the parties assert the court also imposed a five-year term and a five-year determinate term is included in Rivas's abstract of judgment. However, the reporter's transcript of the sentencing hearing does not include any statement by the court imposing the five-year term as to Rivas.

On remand, the trial court shall exercise its newly granted sentencing discretion pursuant to Senate Bill No. 1393, including clarifying its sentencing decision with respect to Rivas. The trial court shall consider the factors enumerated in California Rules of Court, rule 4.428(b) in making its determination whether to strike, dismiss or impose the five-year enhancement as to both defendants. We express no opinion on how the court should exercise its discretion.

f. The custody credits

Defendants contend, and respondent concedes, the trial court erred in failing to award defendants custody credits for the actual days served prior to imposition of sentence. Penal Code section 2933.2 precludes a defendant convicted of murder from receiving conduct credits. It does not apply to actual days served. (*People v. Johnson*

(2010) 183 Cal.App.4th 253, 289.) The trial court was required to award the actual days both defendants served in presentence custody.

DISPOSITION

We remand for a resentencing hearing as follows: (1) the court shall strike the gang enhancements as to both counts and both defendants; (2) the court shall calculate the appropriate number of custody credits to which each defendant is entitled for the actual days served in presentence custody; and (3) the court shall exercise its sentencing discretion pursuant to Penal Code section 667, subdivision (a)(1), as amended by Senate Bill No. 1393.

After resentencing, the superior court is directed to prepare and transmit a new abstract of judgment as to each defendant to the Department of Corrections and Rehabilitation.

The judgments of conviction are affirmed in all other respects.

GRIMES, Acting P. J.

WE CONCUR:

STRATTON, J.

WILEY, J.